IN THE

SUPREME COURT OF THE UNITED STATES

No. ..... Original

October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL., PETITIONERS

PETITIONERS' REPLY TO RESPONDENTS' RETURN AND TO OPPOSITION OF LONE STAR GAS COMPANY

FIRM FOUNDATION—AUSTIN

SUBJECT INDEX

TABLE OF CASES

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

No. ..... Original

October Term, 1941

EX PARTE THE STATE OF TEXAS, ET AL., PETITIONERS

PETITIONERS' REPLY TO RESPONDENTS' RETURN AND TO OPPOSITION OF LONE STAR GAS COMPANY

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the petitioners, the State of Texas, the Railroad Commission of Texas, and Ernest O. Thompson, Jerry Sadler, and Olin Culberson, members of the Railroad Commission of Texas, and Gerald C. Mann, Attorney General of Texas, and for their reply to the return of the respondents, James P. Alexander, Chief Justice, and John H. Sharp and Richard Critz, Associate Justices of the Supreme Court of Texas, to the rule to show cause, and also for their reply to the opposition of Lone Star Gas

Company to petitioners' motion for leave to file their petition for a writ of mandamus in the nature of procedendo, respectfully say:

1. *Jurisdiction to Grant the Relief Prayed for.*

The return of respondents does not discuss the question of jurisdiction. The opposition of Lone Star Gas Company discusses the matter at length, but cites no cases which are controlling or that need any comment to show their inapplicability. Petitioners do not know of any case exactly like this case. But petitioners submit that plainly under Section 262 of the Judicial Code (28 U. S. C. A., sec. 377), this court has jurisdiction to see that its judgment and mandate are correctly construed and applied.

The Lone Star Gas Company's contention that no compulsory process may be issued to state courts is not supported by the decisions. This Court, in fact, has gone much farther than petitioners ask in this case; for example, in *Stanley* v. *Schwalby*, 162 U. S. 255, the order specifically required that the Texas Court of Civil Appeals enter a particular judgment: (162 U. S. at p. 283)

> "Judgment of the court of civil appeals reversed and case remanded to that court, *with instructions to dismiss the action as against the United States, and to enter judgment for the individual defendants, with costs.*" (Emphasis added)

Relief analagous to the relief here prayed for was granted by this Court upon certiorari in *State Tax Commission* v. *Van Cott*, 306 U. S. 511, where this Court, upon finding that the State court erroneously held that the decisions of this Court were controlling, entered an order providing, ". . . . we vacate the judgment of the Supreme Court of Utah and remand the cause to that court for further proceedings," (306 U. S. at p. 516) in order that the cause might be properly determined upon the correct construction of this Court's holdings and such rules of State law as might be applicable.

2. *The Construction of this Court's Opinion and judgment by the Supreme Court of Texas.*

Neither the respondents nor the Lone Star Gas Company makes any argument as to the construction placed by the Supreme Court of Texas upon this Court's judgment and opinion. "While not accepting as correct all of the statements made by petitioners in that connection, respondents deem it unnecessary to comment on these statements in detail." (Respondents' return, p. 3) Since they are not informed as to which of their statements are accepted and which are rejected, petitioners have nothing definite to which they can reply. It is submitted that the effect of the respondents' return and of the Lone Star Gas Company's opposition on this point (Lone Star Gas Company's Opposition, pp. 30-31) is to admit that petitioners have correctly stated the con-

struction placed by the Texas Supreme Court upon the judgment and opinion of this Court.

3. *The Dependence of the Texas Supreme Court's Decision upon Its Construction of the Judgment and Opinion of this Court.*

The principal contention of the respondents and Lone Star Gas Company is that the Texas Supreme Court's decision is not dependent upon its construction of this Court's opinion, and, therefore, that even if the Supreme Court of Texas misconstrued and misapplied this Court's opinion and judgment, nothing can be done about it. Petitioners reply that the opinion of the Texas Supreme Court affirmatively shows that its decision essentially depends upon its construction of this Court's opinion.

It is true that much of the opinion of the Supreme Court of Texas is taken up with its construction of Article 6059 of the Revised Civil Statutes of Texas to the effect that the judicial review of the Railroad Commission's gas rate orders is a complete trial *de novo*. In this respect, the Supreme Court differed with the Court of Civil Appeals. Petitioners urged before the Supreme Court of Texas that its construction of Article 6059 is erroneous. Petitioners recognize, however, that this Court will not undertake to revise a State court's construction of a State statute. For this reason, the petitioners are forced to accept the Texas Supreme Court's construction of Article 6059 as binding upon them here and peti-

tioners have refrained from pointing out the many reasons why they think such construction is wrong. But accepting (as they must at this time) the Supreme Court's construction of Article 6059, petitioners submit that such construction was not the determining factor in the reversal of the judgment of the Court of Civil Appeals by the Texas Supreme Court, and that the Texas Supreme Court plainly placed its judgment upon what it stated to be the binding effect of the judgment of this Court upon the question of the sufficiency of the evidence to sustain the District Court's judgment.

Assuming that Article 6059 must be construed to provide for a trial *de novo* in the District Court, the Texas Supreme Court states the Court of Civil Appeals' ruling on this point as follows: (Petition, pp. 504-505; *Lone Star Gas Co.* v. *State*, 153 S. W. (2d) at p. 687)

> "That even to construe Article 6059, supra, as contemplating a de novo fact trial in the district court in gas rate order confiscation cases, under the undisputed evidence in this record the Gas Company failed, as a matter of law, to offer evidence sufficient to justify holding this gas rate order confiscatory, or unreasonable and unjust."

In determining whether the Court of Civil Appeals held correctly that the Lone Star Gas Company had failed as a matter of law to offer sufficient evidence to justify the District Court in holding the gas rate order confiscatory, or unjust and unreasonable,

the Texas Supreme Court had two courses open to it. It could (1) hold that this question could not even be passed upon by the Court of Civil Appeals because it had already been adjudicated by this Court, or (2) it could have passed upon the Court of Civil Appeals' determination that the evidence was insufficient, on the merits. It is plain that the Texas Supreme Court followed the first course, holding that the sufficiency of the evidence was concluded by this Court's opinion and judgment that neither the Court of Civil Appeals nor the Texas Supreme Court could pass on this question. No other construction can be placed upon the following language of the Texas Supreme Court: (Petition, pp. 509, 530; *Lone Star Gas Co.* v. *State*, 153 S. W. (2d) at pp. 688, 695)

> "After an exhaustive study of Chief Justice Hughes' opinion in this case in the United States Supreme Court, and after viewing such opinion in the light of this record, we have reached the decision that there is no escape from the conclusion that *the United States Supreme Court did consider and did pass upon the sufficiency of the Gas Company's evidence, when considered from the viewpoint of the Company's entire properties, and did hold such evidence legally sufficient to sustain the verdict of the jury finding this rate order confiscatory.* In fact, we think this is the very essence of the United States Supreme Court's holding."

> "From our discussion of the United States Supreme Court opinion in this case it is evident that we hold that that court did consider and

pass upon the sufficiency, in law, of the evidence contained in this record to raise an issue of fact on the question of confiscation involved in this appeal. It is also evident that we hold that such opinion decides that the evidence contained in this record is sufficient, in law, to invoke the fact finding jurisdiction of the district court. *It follows that such matter has been foreclosed by the United States Supreme Court, and is not open for decision by this Court, and was not open for decision by the Court of Civil Appeals.*" (Emphasis added)

The opinion of the Supreme Court of Texas clearly discloses that its judgment reversing the judgment of the Court of Civil Appeals is dependent upon the construction by the Supreme Court of Texas of the opinion of this Court. The holding that the Texas statute, Article 6059, provided for a trial *de novo* does not require that the judgment of the Court of Civil Appeals be reversed, for it is conceded that even if the trial is *de novo* in the District Court, still if the Gas Company failed to offer evidence *sufficient in law to show confiscation*, the Court of Civil Appeals had the power to reverse and render the decision of the District Court. The decision of the Supreme Court of Texas is, therefore, actually dependent on its holding that the Court of Civil Appeals had no right to inquire into the sufficiency of the evidence, because that matter (in the opinion of the Supreme Court of Texas) had been concluded by this Court. It is *because* the Supreme Court of Texas construed Article 6059 to require a trial *de novo* that the question of the sufficiency of the Gas

Company's evidence becomes important. Had the Supreme Court of Texas construed the Texas statute to mean that the finding of the Railroad Commission should be sustained when supported by substantial evidence, then the *sufficiency* of the Gas Company's evidence to sustain a jury verdict of confiscation would have been immaterial, for in that case the only inquiry would have been whether there was substantial evidence to sustain the Railroad Commission's conclusions. Having concluded, however, that Article 6059 required a trial *de novo*, the Texas Supreme Court, in order to reverse the holding of the Court of Civil Appeals, had to hold either that the Court of Civil Appeals had no right to pass on the sufficiency of the evidence or that, upon a consideration of the evidence, the holding of the Court of Civil Appeals was erroneous. The reason given by the Texas Supreme Court for reversing the judgment of the Court of Civil Appeals that the evidence was insufficient as a matter of law to show confiscation is solely that the sufficiency of the evidence was conclusively upheld by the opinion and judgment of this Court—and not that the Texas Supreme Court, upon its own examination of the evidence, finds the evidence to be sufficient in law to sustain such finding. Petitioners, therefore, submit that they were entirely correct in their analysis of the opinion of the Supreme Court of Texas, and that petitioners accurately stated that the sole ground for *reversing* the judgment of the Court of Civil Appeals was the Texas Supreme Court's construction of the opinion and judgment of this Court.

However, the Texas Supreme Court goes even farther than merely holding that this Court's opinion and judgment precluded the Court of Civil Appeals from finding that the Gas Company's evidence *was insufficient as a matter of law.* The Texas Supreme Court in effect held that the Court of Civil Appeals had no authority (because it was foreclosed by this Court's opinion and judgment) to reverse and *remand* the case for a new trial because it found the Commission's order to be valid "factually from so overwhelming a weight and preponderance of the evidence as to require a reversal in the interest of justice." (Petition, p. 116; *State* v. *Lone Star Gas Co.*, 129 S. W. (2d) 1164, 1187) This is made clear by an analysis of the Texas Supreme Court's opinion.

After concluding that the trial in the District Court was *de novo*, the Texas Supreme Court (had it believed the matter of the sufficiency of the evidence to be one which was open to the Court of Civil Appeals) could only have affirmed the Court of Civil Appeals in so far as its judgment reversed and remanded the case for a new trial, without inquiring into any procedural errors, such as the court's charge or the admissibility of evidence. The Court of Civil Appeals has full power to set aside findings of a trial court which it believes to be against the overwhelming weight and preponderance of the evidence and to remand the case for a new trial, as is conceded by the respondents in their return, p. 11. But the Texas Supreme Court affirmed the portion

of the Court of Civil Appeals' judgment reversing and remanding the case *only because of error in admission of evidence in the trial court.* Had it not been for the error in the admission of evidence in the trial court, the Supreme Court would have *affirmed the judgment of the district court.* This is made plain when the Supreme Court of Texas says, after having construed Article 6059 to require a trial *de novo* and after concluding that the Court of Civil Appeals had no right to consider the sufficiency of the evidence: (Petition, p. 534; *Lone Star Gas Co.* v. *State*, 153 S. W. (2d) at p. 697)

> "We shall now examine this record to determine whether we will affirm the judgment of the district court or reverse the same, and remand the cause for a new trial."

The Texas Supreme Court consistently treated the matter of the sufficiency of the evidence to be a matter conclusively determined by this Court. It, therefore, took the position that the District Court's judgment could be reversed only for errors in admitting evidence, even holding that the propriey of the court's charge was settled by this Court, (Petition, pp. 537-538; *Lone Star Gas Co.* v. *State*, 153 S. W. (2d) at p. 698) and, examining the procedural errors complained of, held that the District Court's judgment should be reversed only because of the admission of the testimony of the witness, Ed C. Connor. (Petition, pp. 539-540; *Lone Star Gas Co.* v. *State*, 153 S. W. (2d) at p. 698)

Respondents now say that the Texas Supreme Court "would have rendered the same judgment if it had based the same solely upon its construction of the State statute and not at all upon its construction of the opinion of his (this) court." (Respondents' return, pp. 10-11)

We submit that what the Texas Supreme Court would have done had it construed this Court's judgment differently is purely speculation at this time; what is now material is what the Texas Supreme Court actually did. Perhaps the Texas Supreme Court would have arrived at the same conclusion, regardless of its construction of this Court's opinion and judgment. Petitioners cannot dispute this, because they cannot know what was or is in the Texas Supreme Court's mind except what is expressed in its opinion. But what the Texas Supreme Court might have done if it had construed this Court's opinion and judgment differently is now immaterial. This court has said, "We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate nonfederal ground." See *Indiana* v. *Brand*, 303 U. S. 95, 98. See also *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 666; *Grayson* v. *Harris*, 267 U. S. 352, 358.

Even if the construction of a State statute is given as an alternative ground for the State Court's decision, still this Court has said that it will not refuse to entertain jurisdiction where the federal and non-

federal "grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law" — where the "decision cannot be said to rest squarely upon a construction of the State statute." See *State Tax Commission* v. *Van Cott*, 306 U. S. 511, 513, 514.

CONCLUSION

Petitioners respectfully pray for relief as in their motion for leave to file their petition for a writ of mandamus in the nature of procedendo and in their said petition.

GERALD C. MANN,
Attorney General of Texas

JAMES P. HART,
Austin, Texas

Attorneys for Petitioners, The State of Texas, the Railroad Commission of Texas and its Members, and the Attorney General of Texas.